

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

5 PETER P. MARTINEZ,)
6 Plaintiff,) No. CV-10-0363-CI
7 v.) ORDER GRANTING PLAINTIFF'S
8 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
9 of Social Security,) AND ORDERING REMAND FOR AN
10 Defendant.) AWARD OF BENEFITS

12 BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF
13 No. 13, 16.) Attorney Jeffrey Schwab represents Peter P. Martinez
14 (Plaintiff); Special Assistant United States Attorney Robert L. Van
15 Saghi represents the Commissioner of Social Security (Defendant).
16 The parties have consented to proceed before a magistrate judge.
17 (ECF No. 6.) After reviewing the administrative record and briefs
18 filed by the parties, the court **GRANTS** Plaintiff's Motion for
19 Summary Judgment and **REMANDS** the matter to the Commissioner for an
20 immediate award of benefits.

JURISDICTION

22 On June 12, 2006, Plaintiff protectively filed a Title II
23 application for a closed period from January 20, 2004, through June
24 30, 2008, for disability and disability insurance benefits. (Tr.
25 10; 23.) He also filed a Title XVI application for supplemental
26 security income for the same closed period. (Tr. 96.) He alleged
27 disability due to obsessive compulsive disorder, panic disorder, and
28 major depression with OCD. (Tr. 100.) Plaintiff's claim was denied

1 initially and on reconsideration, and he requested a hearing before
2 an administrative law judge (ALJ). (Tr. 57-68.) A hearing was held
3 on September 30, 2008, at which Vocational Expert Daniel McKinney,
4 and Plaintiff, who was represented by counsel, testified. (Tr. 20-
5 52.) ALJ Robert S. Chester presided. (Tr. 20.) The ALJ denied
6 benefits on October 21, 2008. (Tr. 10-19.) The instant matter is
7 before this court pursuant to 42 U.S.C. § 405(g).

8 **STATEMENT OF THE CASE**

9 The facts of the case are set forth in detail in the transcript
10 of proceedings and are briefly summarized here. At the time of the
11 hearing, Plaintiff was 28 years old. (Tr. 27.) He lived in a
12 mobile home with his parents, and had a driver's license. (Tr. 27-
13 28.) When he was a teen, his parents moved from Walla Walla to
14 Ephrata to get Plaintiff away from a street gang. (Tr. 332-33.)
15 Plaintiff completed high school and one and one-half years of
16 computer training, but he had to quit because he could no longer
17 drive due to his increasingly severe anxiety attacks. (Tr. 28-29.)
18 Plaintiff stopped working at a pizza restaurant and later at an auto
19 express-lube store because he felt more and more frequently anxious,
20 "almost like a claustrophobic feeling," and he believed he was about
21 to "break down all the time." (Tr. 32-33.) Plaintiff testified
22 that he tried to "stick it out and toughen it up," but his anxiety
23 and panic overwhelmed him and he could no longer work. (Tr. 34.)
24 Plaintiff described the problems he had with driving:

25 I would start to basically get severe anxiety attacks
26 especially like at stoplights. For some reason the heat
27 - if it was like summertime the heat would really trigger
28 an anxiety attack. And it wasn't only a physical anxiety
attack, it was also a mental anxiety attack and that's
what made it, you know, 10 times worse. I mean, I felt
like I wanted to get out of the car and run and scream,

1 you know, because of the way I felt. It was just too
2 unbearable. And also, you know, after that just little
3 things started you know, affecting me and becoming big
4 things such as you know, every time I hit a speed bump or
I went over a hole I would start to feel like I hit
somebody and I would have to go back and check and go back
in circles. And it was just bad, that feeling and that
whole mental process.

5

6 (Tr. 36.)

7 Plaintiff experienced this everyday. (Tr. 37.) He also
8 experienced problems with his OCD habits, including constant
9 paranoia about germs on his hands, checking and re-checking doors,
10 locks and "everything" ten or fifteen times, and when he saw the
11 color red, he would "freak out" and that experience affected his
12 entire workday. (Tr. 34-38.) Plaintiff had hallucinations. (Tr.
13 41.) Plaintiff reported that he believed that people were talking
14 about him, laughing at him and that something was wrong with him.
15 (Tr. 39.) As a result, he isolated himself. (Tr. 39.) In July
16 2008, Plaintiff began working the front counter at an athletic club.
17 (Tr. 29-30.) He smokes two or three cigarettes per day, and is
18 trying to quit. (Tr. 35.) Plaintiff reported that Lorazepam and
19 Paxil helped his OCD symptoms, and therapy and exercise helped him
20 as well. (Tr. 35; 37.) Plaintiff requested a closed period of
21 consideration for disability from January 20, 2004, ending June 30,
22 2008. (Tr. 10; 23.)

23

ADMINISTRATIVE DECISION

24 ALJ Chester found Plaintiff's date of last insured for DIB
25 purposes was June 30, 2004. (Tr. 10.) At step one, he found
26 Plaintiff had not engaged in substantial gainful activity since
27 January 20, 2004. (Tr. 12.) At step two, he found Plaintiff had
28 severe impairments of "Depression, Obsessive-Compulsive Disorder,

1 Panic Disorder without Agoraphobia and Personality Disorder." (Tr.
 2 12.) At step three, the ALJ determined Plaintiff's impairments,
 3 alone and in combination, did not meet or medically equal one of the
 4 listed impairments in 20 C.F.R., Subpart P, Appendix 1 (20 C.F.R.
 5 §§ 416.920(d), 416.925 and 416.926). (Tr. 13.) In his step four
 6 findings, the ALJ found Plaintiff's statements regarding pain and
 7 limitations were not credible to the extent they were inconsistent
 8 with the RFC findings. (Tr. 16.) He found that Plaintiff retained
 9 the RFC "to perform a full range of work at all exertional levels
 10 but with the following nonexertional limitations: superficial
 11 contact with the general public and limited collaboration with
 12 coworkers." (Tr. 15.)

13 ALJ Chester found Plaintiff could perform his past work as a
 14 cashier, kitchen helper, and sales clerk. (Tr. 18.)

15 **STANDARD OF REVIEW**

16 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
 17 court set out the standard of review:

18 A district court's order upholding the Commissioner's
 19 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
 20 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
 21 Commissioner may be reversed only if it is not supported
 22 by substantial evidence or if it is based on legal error.
 23 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
 24 Substantial evidence is defined as being more than a mere
 25 scintilla, but less than a preponderance. *Id.* at 1098.
 26 Put another way, substantial evidence is such relevant
 27 evidence as a reasonable mind might accept as adequate to
 28 support a conclusion. *Richardson v. Perales*, 402 U.S.
 389, 401 (1971). If the evidence is susceptible to more
 than one rational interpretation, the court may not
 substitute its judgment for that of the Commissioner.
Tackett, 180 F.3d at 1097; *Morgan v. Commissioner of
 Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

29 The ALJ is responsible for determining credibility,
 30 resolving conflicts in medical testimony, and resolving
 31 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 32 Cir. 1995). The ALJ's determinations of law are reviewed

1 *de novo*, although deference is owed to a reasonable
2 construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

3 It is the role of the trier of fact, not this court, to resolve
4 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
5 supports more than one rational interpretation, the court may not
6 substitute its judgment for that of the Commissioner. *Tackett*, 180
7 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
8 Nevertheless, a decision supported by substantial evidence will
9 still be set aside if the proper legal standards were not applied in
10 weighing the evidence and making the decision. *Brawner v. Secretary*
11 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
12 substantial evidence exists to support the administrative findings,
13 or if conflicting evidence exists that will support a finding of
14 either disability or non-disability, the Commissioner's
15 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
16 1230 (9th Cir. 1987).

SEQUENTIAL PROCESS

18 The Commissioner has established a five-step sequential
19 evaluation process for determining whether a person is disabled. 20
20 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
21 137, 140-42 (1987). In steps one through four, the burden of proof
22 rests upon the claimant to establish a *prima facie* case of
23 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99.
24 This burden is met once a claimant establishes that a physical or
25 mental impairment prevents him from engaging in his previous
26 occupation. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a
27 claimant cannot do his past relevant work, the ALJ proceeds to step
28 five, and the burden shifts to the Commissioner to show that (1) the

1 claimant can make an adjustment to other work; and (2) specific jobs
2 exist in the national economy which claimant can perform. *Batson v.*
3 *Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004).
4 If a claimant cannot make an adjustment to other work in the
5 national economy, a finding of "disabled" is made. 20 C.F.R. §§
6 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

7 **ISSUES**

8 Plaintiff contends that the ALJ erred by applying the incorrect
9 legal standard, and that decision is not supported by substantial
10 evidence. (ECF No. 14 at 3-4.) Plaintiff also contends that the
11 hypotheticals posed to VE were flawed. (ECF No. 14 at 9.)
12 Defendant contends the ALJ's decision is supported by substantial
13 evidence and free of legal error. (ECF No. 17.)

14 **DISCUSSION**

15 **1. Substantial evidence.**

16 Plaintiff contends that the ALJ's decision is not supported by
17 substantial evidence. (ECF No. 14 at 4.) The court reviews the
18 ALJ's decision denying plaintiff disability benefits to determine if
19 the findings are supported by substantial evidence and whether the
20 ALJ used the proper legal standards in reaching the decision. 42
21 U.S.C. § 405(g); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
22 1999); *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998).
23 "Substantial evidence means such relevant evidence as a reasonable
24 mind might accept as adequate to support a conclusion." *Morgan*, 169
25 F.3d at 599; *Meanel*, 172 F.3d at 1113. Substantial evidence is
26 "more than a mere scintilla but less than a preponderance." *Tidwell*
27 *v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1998); *Reddick*, 157 F.3d at
28 720.

1 In determining whether the ALJ's findings are supported by
2 substantial evidence, the court reviews the administrative record as
3 a whole, weighing both the evidence that supports and the evidence
4 that detracts from the ALJ's conclusion. *Reddick*, 157 F.3d at 720.
5 "If the evidence can reasonably support either affirming or
6 reversing the [ALJ's] conclusion, the court may not substitute its
7 judgment for that of the [ALJ]." *Reddick*, 157 F.3d at 720-21.

8 An ALJ is required to consider all of the evidence available in
9 a claimant's case record, including evidence from medical sources.
10 42 U.S.C. § 423(d)(5)(B); see also 20 C.F.R. § 404.1527(d)
11 ("Regardless of its source, we will evaluate every medical opinion
12 we receive."). The term "medical sources" refers to both
13 "acceptable medical sources" and other health care providers who are
14 not acceptable medical sources. See 20 C.F.R. §§ 404.1502 and
15 416.902. In addition to evidence from the acceptable medical
16 sources, the ALJ is required to review evidence from other sources
17 to establish the severity of a claimant's impairments and how it
18 affects the claimant's ability to work. 20 C.F.R. § 404.1513(d).

19 The opinion of an examining physician is entitled to greater
20 weight than the opinion of a nonexamining physician. *Lester v.*
21 *Chater*, 81 F.3d 821, 830-831 (9th Cir. 1995); *Pitzer v. Sullivan*,
22 908 F.2d 502, 506 (9th Cir. 1990). The ALJ must provide "clear and
23 convincing" reasons for rejecting the uncontradicted opinion of an
24 examining physician. *Lester*, 81 F.3d at 830-831; *Pitzer*, 908 F.2d
25 at 506. The opinion of an examining doctor, even if contradicted by
26 another doctor, can be rejected only for "specific" and "legitimate"
27 reasons that are supported by substantial evidence in the record.
28 *Andrews*, 53 F.3d at 1043.

1 Rejecting a treating physician's opinion in favor of a
2 non-treating physician's opinion, without more, is legally
3 erroneous. *See Lester*, 81 F.3d at 830-31 (ALJ's rejection of
4 treating physician's opinion was improper where it was based solely
5 upon the testimony of a non-treating, non-examining medical
6 advisor). Indeed, a non-examining medical advisor's testimony
7 cannot "by itself constitute substantial evidence that warrants a
8 rejection of either the treating doctor's or the examining
9 psychologist's opinion." *Id.* at 833; *Pitzer*, 908 F.2d at 506
10 ("non-examining physicians' conclusion[s], with nothing more" do not
11 constitute substantial evidence controverting an examining
12 physician's opinion.)

13 In finding Plaintiff was not disabled, the ALJ indicated he
14 assigned "significant weight to accepted medical sources while
15 appropriately discounting the weight of evidence from non-accepted
16 sources." (Tr. 18.) The ALJ specified that he gave lesser weight to
17 social workers' diagnoses and opinions. (Tr. 18.) With regard to
18 the opinions from "accepted" medical sources, the ALJ concluded that
19 "the primary contrast between Dr. Gentile and Mr. Caldwell's
20 opinions [are] regarding the level of difficulty the claimant
21 experiences in his social activities." (Tr. 18.) The ALJ concluded
22 that Dr. Gentile's assessment was more accurate. (Tr. 18.)

23 On August 25, 2006, Mary A. Gentile, Ph.D., completed a
24 Psychiatric Review Technique form. (Tr. 281-94.) In that check-
25 the-box form, Dr. Gentile indicated that Plaintiff's impairment was
26 moderate in maintaining social function and he had mild limitations
27 in restriction of daily activities and difficulties maintaining
28 concentration, persistence and pace. (Tr. 291.) Dr. Gentile also

1 completed a Mental Residual Functional Capacity Assessment form.
2 (Tr. 295-97.) Dr. Gentile assessed Plaintiff with three moderate
3 limitations - in the ability to work in coordination with or
4 proximity to others without being distracted by them, the ability to
5 interact appropriately with the general public and the ability to
6 get along with coworkers or peers without distracting them or
7 exhibiting behavior extremes. (Tr. 295-96.) Dr. Gentile's
8 narration indicated Plaintiff was able "to understand, remember, and
9 carry out simple and multi-step instruction. He would be more
10 successful in a secluded or individual work environment." (Tr.
11 297.) Dr. Gentile also opined that Plaintiff would do best away
12 from the general public, with limited coworker interaction, and he
13 would be able to adjust to change, set realistic goals, avoid
14 hazards and travel or use public transportation. (Tr. 297.)
15 Finally, it appears Dr. Gentile dismissed all non-accepted medical
16 source treating providers: "insufficient for Title II DLI 6/30/04;
17 earlier records from Grant County MH are all non-doctoral
18 providers." (Tr. 293.)

19 On April 26, 2005, Sean Caldwell, M.S. (Cand.), examined
20 Plaintiff and produced an evaluation that was adopted by Mahlon
21 Dalley, Ph.D. (Tr. 152-55.) Mr. Caldwell reported that while
22 Plaintiff said he had an obsessive fear of germs that impacted his
23 social interaction, he was able to sit in the lobby and interact
24 with others prior to his appointment, and to shake hands, open door
25 handles and put his hands on surfaces of tables. (Tr. 152.) At the
26 time of the evaluation, Plaintiff was taking Paxil and Lorazepam.
27 (Tr. 152.) His results on the MMPI-2 indicate he experiences severe
28 emotional distress characterized by dysphoria, agitation, worrying

1 and anhedonia. (Tr. 154.) Mr. Caldwell diagnosed panic disorder
2 without agoraphobia, personality disorder not otherwise specified
3 with borderline features. (Tr. 154.) Mr. Caldwell found Plaintiff
4 was markedly impaired in his ability to interact appropriately in
5 public contacts and in the ability to respond appropriately to and
6 tolerate the pressures and expectations of a normal work setting.
7 (Tr. 158.) Mr. Caldwell explained that "features of Peter's panic
8 disorder may affect his ability to tolerate the social expectations
9 and pressures of a normal work environment... [O]nce Mr. Martinez's
10 symptoms have stabilized, he should be able to return to work."
11 (Tr. 155; 157.)

12 On July 28, 2005, Sean Caldwell, M.S. (Cand.), examined
13 Plaintiff a second time and produced an evaluation that was again
14 adopted by Mahlon Dalley, Ph.D. (Tr. 160-64.) Plaintiff's results
15 on the MMPI-2 again indicated he experiences severe emotional
16 distress characterized by dysphoria, agitation, worrying and
17 anhedonia. (Tr. 162.) Mr. Caldwell found Plaintiff remained
18 markedly impaired in his ability to interact appropriately in public
19 contacts and in the ability to respond appropriately to and tolerate
20 the pressures and expectations of a normal work setting. (Tr. 167.)
21 He was also moderately impaired in several categories. (Tr. 166-
22 67.) Similar to his April evaluation, Mr. Caldwell maintained the
23 opinion that "[w]hile features of his personality disorder may
24 affect his personal and professional relationships, features of his
25 depressive and anxiety disorders will likely affect his ability to
26 tolerate the social pressures and expectations of a normal work
27 environment. . . . Once his symptoms stabilize, Mr. Martinez should
28 be able to return to work." (Tr. 163.)

1 On de novo review, the record reveals the differences between
2 Dr. Gentile's and Mr. Caldwell's assessments are more significant
3 than a mere difference in assessed limitations related to "social
4 activities." (Tr. 18.) Dr. Gentile found Plaintiff was able to
5 work with three moderate limitations. (Tr. 295-96.) Mr. Caldwell,
6 on the other hand, found Plaintiff was incapable of working until
7 his symptoms stabilized. After both examinations, Mr. Caldwell
8 concluded that Plaintiff's panic and/or personality disorder caused
9 significant impairments in his ability to tolerate the social
10 expectations and pressures of a normal work environment. (Tr. 155;
11 157; 163.)

12 The social activities cited by the ALJ as support for adopting
13 Dr. Gentile's assessment over Mr. Caldwell's included: "during the
14 closed period, the claimant has been able to attend parties, go on
15 long-distance trips, and visit with friends." (Tr. 18.)

16 In records that span over four years, evidence exists that
17 Plaintiff attended two parties - the first party was during a trip
18 to Seattle with a friend, in July 2003, before the beginning of the
19 closed period. (Tr. 460.) The second party occurred in March 2006.
20 Plaintiff left during the party because he began to experience a
21 severe panic attack. He ended up in the hospital emergency room.
22 (Tr. 170.)

23 One of Plaintiff's treatment goals was to "get out more" and
24 socialize with friends. (Tr. 444-70; 493; 497.) Evidence exists
25 Plaintiff took one trip to go crab fishing in July 2006, and at the
26 appointment prior to departure, he requested an increase in his
27 medications because he recently had experienced increasing panic
28 episodes. (Tr. 266.)

1 The reasons relied upon by the ALJ that justify giving more
2 weight to Dr. Gentile's assessment are neither specific and
3 legitimate, nor supported by substantial evidence. The ALJ failed
4 to give specific and legitimate reasons supported by substantial
5 evidence for rejecting Mr. Caldwell and Dr. Dalley's assessments of
6 Plaintiff's limitations.

7 Moreover, Dr. Gentile's assessment that Plaintiff is "able to
8 understand, remember, and carry out simple and multi-step
9 instruction" is not supported by substantial evidence, and is
10 contradicted by other opinion testimony. (Tr. 297.) For example,
11 Heidi Whitney, M.S., evaluated Plaintiff on January 4, 2005, and
12 found Plaintiff had marked impairments in his ability to understand,
13 remember and follow complex instructions. (Tr. 481.) The
14 assessment from Brian G. Milliken, MA, LMCH, on June 24, 2005,
15 echoes this finding of marked impairment in the ability to
16 understand, remember and follow complex instructions. (Tr. 477-78.)
17 Because Dr. Gentile's assessment is not supported by the record, and
18 because that assessment does not constitute substantial evidence
19 controverting the examining providers, the ALJ erred by adopting Dr.
20 Gentile's assessment and rejecting the other examining providers.

21 **2. Other source medical opinions.**

22 An ALJ may discount the opinion of a non-acceptable medical
23 source by providing reasons that are "germane" to that source. Cf.
24 *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005); *Dodrill v.*
25 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). Such reasons include
26 conflicting medical evidence, prior inconsistent statements, or a
27 claimant's daily activities. *Lewis v. Apfel*, 236 F.3d 503, 511-12
28 (9th Cir. 2001). In this case, the ALJ indicated he discounted "the

1 weight of evidence from non-accepted sources. Specifically, the
2 undersigned has given lesser weight to social workers' diagnoses and
3 opinions that the claimant was either markedly or severely limited
4 in his functions." (Tr. 18.) Without further elaboration, the ALJ
5 rejected the opinions of Heidi Whitney, M.S., Brian G. Milliken,
6 M.A., LMCH, and Katheryn Espinoza, M.S.W., based solely on the non-
7 accepted medical source status. This was error.

8 The fact that the identified examiners were not acceptable
9 medical sources does not mean that, under the law, these opinions
10 must automatically be given less weight. The opinion of a medical
11 source other than an accepted medical source may be accorded weight
12 depending on the factors listed in 20 C.F.R. § 416.927(c)– i.e., how
13 long the source has known and how frequently the source has seen the
14 individual, how consistent the opinion is with other evidence, the
15 degree to which the source presents relevant evidence to support an
16 opinion, how well the source explains the opinion, whether the
17 source has a specialty or area of expertise related to the
18 claimant's impairment, and any other factors that tend to support or
19 refute the opinion. See SSR 06-3p. Social Security Ruling 06-3p
20 specifically states that, "depending on the particular facts in a
21 case, and after applying the factors for weighing opinion evidence,
22 an opinion from a medical source who is not an 'acceptable medical
23 source' may [even] outweigh the opinion of an 'acceptable medical
24 source,' including the medical opinion of a treating source." SSR
25 06-3p.

26 In this case, it is not apparent that the ALJ made a complete
27 consideration of the above factors specified in § 416.927(c) in
28 evaluating the "other source" opinions. The assessments of

1 Plaintiff by the "other source" medical providers are largely
2 consistent, supported by the record, and discounting the opinions
3 because they were not from "acceptable medical sources" was error.

4 **3. Remand.**

5 The court has discretion in deciding whether to remand for
6 further proceedings or for immediate payment of benefits. *Harman*,
7 211 F.3d at 1178. The issue turns on the utility of further
8 proceedings. A remand for an award of benefits is appropriate when
9 no useful purpose would be served by further administrative
10 proceedings or when the record has been fully developed and the
11 evidence is insufficient to support the Commissioner's decision.
12 *Strauss v. Comm'r*, 635 F.3d 1135, 1138 (9th Cir. 2011) (quoting
13 *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004)). The
14 reviewing court may not award benefits punitively, and must conduct
15 a credit-as-true analysis to determine if a claimant is disabled
16 under the Act. *Id.* at 1138.

17 Under the "crediting as true" doctrine, evidence should be
18 credited and an immediate award of benefits directed where "(1) the
19 ALJ has failed to provide legally sufficient reasons for rejecting
20 such evidence, (2) there are no outstanding issues that must be
21 resolved before a determination of disability can be made, and (3)
22 it is clear from the record that the ALJ would be required to find
23 the claimant disabled were such evidence credited." *Id.* The
24 "crediting as true" doctrine is not a mandatory rule in the Ninth
25 Circuit, but leaves the court flexibility in determining whether to
26 enter an award of benefits upon reversing the Commissioner's
27 decision. *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003)
28 (citing *Bunnell*, 947 F.2d 341, 348 (9th Cir. 1991)). The court must

1 finally determine whether the record clearly requires an award of
2 benefits after the improperly rejected evidence is credited.
3 *Strauss*, 635 F.3d at 1138.

4 Listing 12.06 reads as follows:

5 In these disorders anxiety is either the predominant
6 disturbance or it is experienced if the individual
7 attempts to master symptoms; for example, confronting the
dreaded object or situation in a phobic disorder or
resisting the obsessions or compulsions in obsessive
compulsive disorders.

8 The required level of severity for these disorders is met
9 when the requirements in both A and B are satisfied, or
when the requirements in both A and C are satisfied.

10 A. Medically documented findings of at least one of the
11 following:

12 1. Generalized persistent anxiety accompanied by three out
of four of the following signs or symptoms:

13 a. Motor tension; or
14 b. Autonomic hyperactivity; or
15 c. Apprehensive expectation; or
16 d. Vigilance and scanning;

17 Or

18 2. A persistent irrational fear of a specific object,
activity, or situation which results in a compelling
desire to avoid the dreaded object, activity, or
situation; or

19 3. Recurrent severe panic attacks manifested by a sudden
unpredictable onset of intense apprehension, fear, terror
and sense of impending doom occurring on the average of at
least once a week; or

20 4. Recurrent obsessions or compulsions which are a source
of marked distress; or

21 5. Recurrent and intrusive recollections of a traumatic
experience, which are a source of marked distress;

22 And

23 B. Resulting in at least two of the following:

24

- 1 1. Marked restriction of activities of daily living; or
- 2 2. Marked difficulties in maintaining social functioning;
- 3 or
- 4 3. Marked difficulties in maintaining concentration,
4 persistence, or pace; or
- 5 4. Repeated episodes of decompensation, each of extended
5 duration.
6 or

7 C. Resulting in complete inability to function
7 independently outside the area of one's home.

8
9 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.06.

10 The other source opinions included the January 4, 2005,
11 evaluation by Heidi Whitney, M.S. Ms. Whitney found Plaintiff had
12 severe impairments related to verbal expression of anxiety or fear,
13 social withdrawal, the ability to relate appropriately to co-workers
14 and supervisors, and the ability to respond appropriately to and
15 tolerate the pressures and expectations of a normal setting. (Tr.
16 481-82.) She also found he had marked impairments of depressed
17 mood, paranoid behavior, global illness, the ability to understand,
18 remember and follow complex instructions, the ability to learn new
19 tasks, the ability to exercise judgment and make decisions, and the
20 ability to interact appropriately in public contacts. (Tr. 481.)
21 Ms. Whitney noted that medication "helped him a great deal to
22 function on [a] daily basis." (Tr. 483.) Ms. Whitney concluded
23 that Plaintiff was "acutely mentally ill" and noted that while
24 Plaintiff likes to work, he has not been able to hold down a job for
25 more than a couple of months because he cannot handle "being under
26 someone's control." (Tr. 483.)

27 On June 24, 2005, Brian G. Milliken, MA, LMCH, evaluated
28 Plaintiff and found he had a severe impairment in global illness

1 based upon the intensity and pervasiveness of all symptoms and
2 impairments of functioning, along with marked impairments in
3 depressed mood, the ability to understand, remember and follow
4 complex instructions, and in the ability to respond appropriately to
5 and tolerate the pressure and expectations of a normal work setting.
6 (Tr. 477-78.) He assessed Plaintiff with multiple moderate
7 impairments. (Tr. 477-78.) Mr. Milliken concluded that Plaintiff
8 was "acutely mentally ill" and noted that he "appear[ed] to be
9 progressing toward treatment goals." (Tr. 479.)

10 On January 1, 2006, Katheryn E. Espinoza, MSW, examined
11 Plaintiff and completed a Psychological/Psychiatric Evaluation form.
12 (Tr. 472-74.) Ms. Espinoza found Plaintiff had a severe impairment
13 relating to his ability to respond appropriately to and tolerate the
14 pressure and expectations of a normal work setting. (Tr. 474.) Ms.
15 Espinoza also assessed Plaintiff with multiple marked impairments
16 including depressed mood, verbal expression of anxiety or fear,
17 social withdrawal, motor agitation, thought disorder, global
18 illness, the ability to exercise judgment and make decisions, the
19 ability to interact appropriately in public contacts, and the
20 ability to control physical or motor movements and maintain
21 appropriate behavior. (Tr. 472-74.) Ms. Espinoza noted that due to
22 his OCD, Plaintiff is repetitive in several of his actions and this
23 impairs his judgment and ability to perform tasks, and also limits
24 his abilities in the social realm. (Tr. 474.) Ms. Espinoza opined
25 that Plaintiff "can learn how to control aspects of his OCD but he
26 will always have to deal with this disorder." (Tr. 47.) She
27 concluded Plaintiff was "chronically mentally ill." (Tr. 475.)

28 In this case, Plaintiff's counsel posed a hypothetical to the

1 vocational expert incorporating the improperly rejected medical
2 opinions:

3 Q. I'd like you to assume, Mr. McKinney, that similarly
4 this individual would have no exertional limitations,
5 but nonexertional limitations would be as follows.
6 This person would have severe limitations in the
7 ability to relate appropriately to coworkers and
8 supervisors and in the ability to respond
9 appropriately to and tolerate the pressures and
10 expectations of a normal work setting. Would have a
11 marked limitation in the ability to understand,
12 remember, and follow complex, more than two-step
13 instructions. Would have moderate limitations in the
14 ability to understand, remember and follow simple one
15 or two-step instructions in the ability to learn new
16 tasks, in the ability to exercise judgment and make
17 decisions, and in the ability to interact
18 appropriately in public contacts. With those
19 limitations could such an individual perform past
20 relevant work?

21 A: No, he could not.

22 Q. Is there any other work that such an individual could
23 perform in the national economy?

24 A. I think with these limitations the person would not
25 be able to maintain any form of competitive
employment. I think the person would have difficulty
with sheltered jobs.

26 (Tr. 48.) Plaintiff's counsel offered two additional hypotheticals
27 that altered the severity of the impairments. The first alternate
28 hypothetical included marked limitations in the ability to
understand, remember, and follow complex, more than two-step
instructions and in the ability to respond appropriately to and
tolerate the pressures and expectations of a normal work setting.
The individual also would have moderate limitations in the ability
to understand, remember and follow simple one or two-step
instructions in the ability to learn new tasks, in the ability to
exercise judgment and make decisions, and in the ability to perform
routine tasks, and the ability to control physical or motor

1 movements and maintain appropriate behavior. (Tr. 49.) The VE
2 indicated that hypothetical person would not be able to maintain
3 competitive employment. (Tr. 49.)

4 The second alternate hypothetical offered by Plaintiff's
5 counsel described an individual who suffered severe limitations in
6 the ability to respond appropriately to and tolerate the pressures
7 and expectations of a normal work setting. Also, the person would
8 have marked limitations in the ability to exercise judgment and make
9 decisions, in the ability to interact appropriately in public
10 contacts and in the ability to control physical or motor movements
11 and maintain appropriate behavior. Additionally, the individual
12 would have a moderate limitation in the ability to learn new tasks.
13 (Tr. 49-50.) The VE indicated that hypothetical person would not be
14 able to maintain competitive employment. (Tr. 50.)

15 When the other source medical opinions are properly credited,
16 it is apparent that Plaintiff could not sustain work during the
17 closed period. Because the evidence establishes that Plaintiff was
18 unable to maintain employment during the closed period, remand for
19 further administrative proceedings serves no useful purpose and is
20 unwarranted.

21 **CONCLUSION**

22 Having reviewed the record and the ALJ's findings, this court
23 concludes the ALJ's decision is not supported by substantial
24 evidence and is based on legal error. Because no remaining issues
25 exist that must be resolved and it is clear from the record that
26 Plaintiff is entitled to disability benefits for the closed period,
27 the court REMANDS to the Commissioner of Social Security for an
28 award of benefits. Accordingly,

IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment (**ECF No. 13**) is **GRANTED** and the matter is remanded to the Commissioner for an immediate award of benefits.

2. Defendant's Motion for Summary Judgment (ECF No. 16) is
DENIED.

3. An application for attorney fees may be filed by separate motion.

9 The District Court Executive is directed to file this Order and
10 provide a copy to counsel for Plaintiff and Defendant. Judgment
11 shall be entered for Plaintiff, and the file shall be CLOSED.

DATED July 31, 2012.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE